

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DEBRA A. BONANNO,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

No. 11-CV-227-JPH

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND REMANDING FOR
ADDITIONAL PROCEEDINGS
PURSUANT TO SENTENCE FOUR 42
U.S.C. § 405(g)

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec.14, 16.) Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Alexess D. Rea represents defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** plaintiff's Motion for Summary Judgment and **DENIES** defendant's Motion for Summary Judgment.

JURISDICTION

Plaintiff Debra A. Bonanno (plaintiff) filed for supplemental security income (SSI) and disability insurance benefits (DIB) on November 10, 2008. (Tr. 154, 157, 190.) Plaintiff alleged an onset date of February 13, 2003. (Tr. 154, 157.) Benefits were denied initially and on reconsideration. (Tr. 106, 109, 114, 117.) Plaintiff requested a hearing before an administrative law judge (ALJ), which was held before ALJ James W. Sherry on April 9, 2010. (Tr. 57-95.) Plaintiff was represented by counsel and testified at the hearing. (Tr.60-84.) Vocational expert Daniel R. McKinney also testified. (Tr. 85-93.) The ALJ denied benefits (Tr. 14-24.) and the Appeals Council denied review. (Tr. 1.) The matter is now before this

1 court pursuant to 42 U.S.C. § 405(g).

2 **STATEMENT OF FACTS**

3 The facts of the case are set forth in the administrative hearing transcripts, the ALJ's decision, and
4 the briefs of plaintiff and the Commissioner, and will therefore only be summarized here.

5 Plaintiff was 53 years old at the time of the hearing. (Tr. 61.) She has a high school education and
6 one year of college. (Tr. 62.) She also had a medical assistant certificate, although she never had a job
7 as a medical assistant. (Tr. 62.) She has work experience in a school kitchen, at a bank sorting checks and
8 other papers, and housekeeping at a medical care center. (Tr. 64-67.) Plaintiff testified she left her last
9 job because she had really bad depression and anxiety and she was not able to sleep. (Tr. 68.) In 2004,
10 plaintiff broke her right ankle and had surgery. (Tr. 68-69.) She still has swelling and pain in her ankle.
11 (Tr. 69.) She also has pain and swelling in her right knee. (Tr. 69-70.) She has problems going to sleep
12 and getting enough sleep. (Tr. 70.) She has stiffness in all her joints and her lower back bothers her. (Tr.
13 70-71.) Plaintiff has restless leg syndrome, chest pain and acid-reflux. (Tr. 71-73.) She has trouble
14 breathing and gets pneumonia frequently . (Tr. 73.) She experiences panic attacks, has difficulty
15 concentrating and is forgetful. (Tr. 82-83.) Plaintiff testified she does not do well in social settings
16 because she thinks everyone hates her. (Tr. 84.)

17 **STANDARD OF REVIEW**

18 Congress has provided a limited scope of judicial review of a Commissioner's decision. 42 U.S.C.
19 § 405(g). A Court must uphold the Commissioner's decision, made through an ALJ, when the
20 determination is not based on legal error and is supported by substantial evidence. *See Jones v. Heckler*,
21 760 F. 2d 993, 995 (9th Cir. 1985); *Tackett v. Apfel*, 180 F. 3d 1094, 1097 (9th Cir. 1999). "The
22 [Commissioner's] determination that a claimant is not disabled will be upheld if the findings of fact are
23 supported by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th Cir. 1983) (citing 42
24 U.S.C. § 405(g)). Substantial evidence is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
25 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance. *McAllister v. Sullivan*, 888 F.2d 599, 601-
26 602 (9th Cir. 1989); *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d 573, 576 (9th Cir.
27 1988). Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate
28 to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citations omitted). "[S]uch

1 inferences and conclusions as the [Commissioner] may reasonably draw from the evidence” will also be
 2 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On review, the Court considers the record
 3 as a whole, not just the evidence supporting the decision of the Commissioner. *Weetman v. Sullivan*, 877
 4 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v. Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

5 It is the role of the trier of fact, not this Court, to resolve conflicts in evidence. *Richardson*, 402
 6 U.S. at 400. If evidence supports more than one rational interpretation, the Court may not substitute its
 7 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
 8 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the
 9 proper legal standards were not applied in weighing the evidence and making the decision. *Browner v.*
 10 *Sec’y of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). Thus, if there is substantial
 11 evidence to support the administrative findings, or if there is conflicting evidence that will support a
 12 finding of either disability or nondisability, the finding of the Commissioner is conclusive. *Sprague v.*
 13 *Bowen*, 812 F.2d 1226, 1229-30 (9th Cir. 1987).

14 SEQUENTIAL PROCESS

15 The Social Security Act (the “Act”) defines “disability” as the “inability to engage in any
 16 substantial gainful activity by reason of any medically determinable physical or mental impairment which
 17 can be expected to result in death or which has lasted or can be expected to last for a continuous period
 18 of not less than 12 months.” 42 U.S.C. §§ 423 (d)(1)(A), 1382c (a)(3)(A). The Act also provides that a
 19 plaintiff shall be determined to be under a disability only if his impairments are of such severity that
 20 plaintiff is not only unable to do his previous work but cannot, considering plaintiff’s age, education and
 21 work experiences, engage in any other substantial gainful work which exists in the national economy. 42
 22 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and
 23 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

24 The Commissioner has established a five-step sequential evaluation process for determining
 25 whether a claimant is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if he or she is
 26 engaged in substantial gainful activities. If the claimant is engaged in substantial gainful activities,
 27 benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I).

28 If the claimant is not engaged in substantial gainful activities, the decision maker proceeds to step

1 two and determines whether the claimant has a medically severe impairment or combination of
2 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the claimant does not have a severe
3 impairment or combination of impairments, the disability claim is denied.

4 If the impairment is severe, the evaluation proceeds to the third step, which compares the
5 claimant's impairment with a number of listed impairments acknowledged by the Commissioner to be
6 so severe as to preclude substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii);
7 20 C.F.R. § 404 Subpt. P App. 1. If the impairment meets or equals one of the listed impairments, the
8 claimant is conclusively presumed to be disabled.

9 If the impairment is not one conclusively presumed to be disabling, the evaluation proceeds to the
10 fourth step, which determines whether the impairment prevents the claimant from performing work he
11 or she has performed in the past. If plaintiff is able to perform his or her previous work, the claimant is
12 not disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, the claimant's residual
13 functional capacity ("RFC") assessment is considered.

14 If the claimant cannot perform this work, the fifth and final step in the process determines whether
15 the claimant is able to perform other work in the national economy in view of his or her residual
16 functional capacity and age, education and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
17 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

18 The initial burden of proof rests upon the claimant to establish a *prima facie* case of entitlement
19 to disability benefits. *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v. Apfel*, 172 F.3d
20 1111, 1113 (9th Cir. 1999). The initial burden is met once the claimant establishes that a physical or
21 mental impairment prevents him from engaging in his or her previous occupation. The burden then shifts,
22 at step five, to the Commissioner to show that (1) the claimant can perform other substantial gainful
23 activity and (2) a "significant number of jobs exist in the national economy" which the claimant can
24 perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th Cir. 1984).

25 ALJ'S FINDINGS

26 At step one of the sequential evaluation process, the ALJ found plaintiff has not engaged in
27 substantial gainful activity since February 13, 2003, the alleged onset date. (Tr. 16.) At step two, the ALJ
28 found plaintiff has the following medically determinable impairments: degenerative arthritis of the right

1 ankle, status post right ankle fracture and internal fixation; left wrist tendinitis; GERD; hyperlipidemia;
 2 hypertension; obesity; obstructive sleep apnea; right knee degenerative changes; major depressive
 3 disorder; generalized anxiety disorder; and undifferentiated somatoform disorder. (Tr. 16.) At step three,
 4 the ALJ found plaintiff does not have an impairment or combination of impairments that meets or
 5 medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpt. P, App. 1. (Tr.18.) The ALJ
 6 then determined:

7 [T]he claimant has the residual functional capacity to lift and/or carry no
 8 more than 20 pounds occasionally and 10 pounds frequently, stand and/or
 9 walk about six hours in an eight hour workday, sit about six hours in an
 10 eight hour workday, and perform unlimited pushing and pulling within the
 11 lifting restrictions. The claimant can perform simple, routine, and
 12 repetitive tasks, as well as some well learned detailed tasks. The claimant
 13 can maintain concentration for two hour segments for simple tasks without
 14 more than normally expected brief interruptions. The claimant can engage
 15 in superficial interaction with the general public and occasional interaction
 16 with co-workers and supervisors, and she would work best in an
 17 environment where interactions with supervisors and co-workers are
 18 positive and goal-oriented.

19 (Tr. 20.) At step four, the ALJ determined plaintiff is capable of performing past relevant work. (Tr. 23.)
 20 Thus, the ALJ concluded plaintiff has not been under a disability as defined in the Social Security Act
 21 since February 13, 2003 through the date of the decision. (Tr. 24.)

22 ISSUES

23 The question is whether the ALJ's decision is supported by substantial evidence and free of legal
 24 error. Specifically, plaintiff asserts the ALJ erred in considering the medical and psychological evidence.
 25 (ECF No. 15 at 10-20.) Defendant argues the ALJ's decision is rational and supported by substantial
 26 evidence. (ECF No. 17 at 15-25.)

27 DISCUSSION

28 Plaintiff argues the ALJ failed to properly consider the medical and psychological opinion
 evidence. (ECF no. 15 at 10-20.) In disability proceedings, a treating physician's opinion carries more
 weight than an examining physician's opinion, and an examining physician's opinion is given more
 weight than that of a non-examining physician. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004);
Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1995). If the treating or examining physician's opinions are
 not contradicted, they can be rejected only with clear and convincing reasons. *Lester*, 81 F.3d at 830. If
 contradicted, the opinion can only be rejected for "specific" and "legitimate" reasons that are supported

by substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995). Historically, the courts have recognized conflicting medical evidence, the absence of regular medical treatment during the alleged period of disability, and the lack of medical support for doctors' reports based substantially on a claimant's subjective complaints of pain as specific, legitimate reasons for disregarding a treating or examining physician's opinion. *Flaten v. Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995); *Fair*, 885 F.2d at 604.

If a treating or examining physician's opinions are not contradicted, they can be rejected only with clear and convincing reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). However, if contradicted, the ALJ may reject the opinion if he states specific, legitimate reasons that are supported by substantial evidence. *See Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995) (citing *Magallanes v. Bowen*, 881 F.2d 747, 753 (9th Cir. 1989); *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir. 1989)).

1. Psychological Opinions

a. Dr. Dalley

Plaintiff argues the ALJ did not properly consider or reject the opinion of Dr. Dalley. (ECF No. 15 at 14-15.) Dr. Dalley examined plaintiff in April 2007, April 2008 and March 2009. He prepared a psychological evaluation report and completed a DSHS Psychological/Psychiatric Evaluation form for each examination. (Tr. 324-41, 423-31.) In April 2007, Dr. Dalley diagnosed major depressive disorder, recurrent, moderate; generalized anxiety disorder; and undifferentiated somatoform disorder (Tr. 325, 331), while in April 2008 and March 2009 he diagnosed major depressive disorder, recurrent, moderate; and generalized anxiety disorder. (Tr. 334, 340, 424, 430.) In 2007, Dr. Dalley assessed one moderate cognitive limitation in the ability to exercise judgment and make decisions and two moderate and three marked social limitations. (Tr. 326.) In 2008, Dr. Dalley assessed no cognitive limitations but two moderate and three marked social limitations. (Tr. 335.) In 2009, Dr. Dalley assessed one mild cognitive limitations and two moderate and three marked social limitations. (Tr. 425.) Dr. Dalley opined, "Features of these [diagnoses] will likely affect her ability to tolerate the social pressures and expectations of a normal work environment." (Tr. 332.) Similarly, Dr. Dalley stated, "At this time, her current depressive and anxiety symptoms are likely to interfere with her ability to function in a normal employment

1 position.” (Tr. 430.)

2 The ALJ considered and gave little weight to Dr. Dalley’s opinion. (Tr. 22.) The ALJ gave two
3 reasons for rejecting the opinion: (1) the opinion is not consistent with the benign findings noted in
4 mental status examinations; and (2) the opinion is undermined by plaintiff’s scores on the MMPI and PAI
5 which suggest over reporting of symptoms. (Tr. 22.) The ALJ is correct that the results of the mini-mental
6 status exams showed plaintiff has average mental control and an average fund of general information as
7 well as the ability to think abstractly. (Tr. 329, 338, 428.) However, the ALJ’s reasoning overlooks the
8 fact that most of the limitations assessed by Dr. Dalley involve social functioning rather than cognitive
9 functioning. The mini mental status exam tests mental control, fund of information, and the ability to
10 think abstractly, but does not address social functioning. Thus, Dr. Dalley’s findings on the mental status
11 exams are largely consistent with his 2008 and 2009 findings of no or mild cognitive limitations.

12 Similarly, the ALJ’s consideration of Dr. Dalley’s findings regarding the results of the MMPI-2
13 and the PAI is flawed. In 2007, Dr. Dalley found plaintiff’s MMPI-2 results invalid and indicative of over
14 reporting of symptoms of psychopathology. (Tr. 300.) However, Dr. Dalley opined the MMPI-2 profile
15 is more consistent with “plea for help” type of profile than that of an overt attempt to malingering. (Tr. 330.)
16 Similarly, the PAI score had an elevated “Negative Impression” score consistent with a plea for help
17 rather than malingering, while the somatic complaints, depression and anxiety scores were “all consistent
18 with her presenting problems and previous history.” (Tr. 331.) In 2008, plaintiff’s MMPI-2 score was
19 valid and consistent with scores of individuals who are depressed, worried, agitated and tense and who
20 are likely to have difficulty thinking and concentrating. (Tr. 339.) In 2009, plaintiff’s MMPI-2 results
21 were again invalid, but Dr. Dalley indicated he believed the scores to suggest a “plea for help” rather than
22 an attempt to “fake bad” for secondary gain due to the results of the MACE, a memory malingering test
23 which indicated plaintiff was not malingering memory problems. (Tr. 429.) An ALJ must not substitute
24 his medical judgment for a doctor’s. *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990).¹ Dr. Dalley’s

25
26 ¹It is well-settled that “the ALJ cannot arbitrarily substitute his own judgment for competent
27 medical opinion.... [W]hile an [ALJ] is free to resolve issues of credibility as to lay testimony or to
28 choose between properly submitted medical opinions, he is not free to set his own expertise against that

1 explanation of test results suggesting over reporting of systems was not mentioned by the ALJ and reflects
 2 Dr. Dalley's professional judgment. The ALJ is not at liberty to reject Dr. Dalley's interpretation of the
 3 test results in favor of the ALJ's own interpretation without substantial evidence supporting that
 4 interpretation. The ALJ's conclusion regarding the evidence of exaggeration is not supported by
 5 substantial evidence and the ALJ erred. Because the ALJ's two reasons for rejecting Dr. Dalley's opinion
 6 are flawed, the ALJ did not provide legally sufficient specific, legitimate reasons supported by substantial
 7 evidence. Therefore, the ALJ's rejection of Dr. Dalley's opinion is based on error.

8 **b. Dr. Rosekrans**

9 Plaintiff argues the ALJ gave no reasons for rejecting Dr. Rosekrans' opinion. (ECF no. 15 at 17.)
 10 Dr. Rosekrans evaluated plaintiff in July 2005 and prepared a psychological evaluation report. (Tr. 261-
 11 65.) Dr. Rosekrans diagnosed adjustment disorder with mixed anxiety and depressed mood and assessed
 12 a GAF of 45,² noting, "Major impairment in several areas of functioning." (Tr. 265.) The ALJ
 13 acknowledged Dr. Rosekrans' findings and cited plaintiff's reported symptoms and Dr. Rosekrans' exam
 14 findings. (Tr. 17-18.) However, the ALJ did not assign weight to or specifically accept or reject the

16 of a physician who [submitted an opinion to or] testified before him." *McBayer v. Secretary of Health*
 17 *and Human Servs.*, 712 F.2d 795, 799 (2d Cir.1983); *see also Day v. Weinberger*, 522 F.2d 1154, 1156
 18 (9th Cir.1975); *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir.1999) (As a lay person, an ALJ is "not at
 19 liberty to ignore medical evidence or substitute his own views for uncontroverted medical opinion"; he
 20 is "simply not qualified to interpret raw medical data in functional terms."); *Balsamo v. Chater*, 142 F.3d
 21 75, 81 (2d Cir.1998) ("[T]he ALJ cannot arbitrarily substitute his own judgment for competent medical
 22 opinion' " (citations omitted)); *Rohan v. Chater*, 98 F.3d 966, 970 (7th Cir.1996) (ALJ "must not
 23 succumb to the temptation to play doctor and make [his] own independent medical findings."); *Ferguson*
 24 *v. Schweiker*, 765 F.2d 31, 37 (3d Cir.1985) (ALJ may not substitute his interpretation of laboratory
 25 reports for that of physician).

26 ²A GAF score of 41-50 indicates serious symptoms or any serious impairment in social,
 27 occupation, or school functioning. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 4TH
 28 Ed. at 32.

1 opinion. The ALJ need not discuss all evidence presented, but must explain why significant probative
2 evidence has been rejected. *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984). Defendant argues
3 Dr. Rosekrans did not opine as to plaintiff's specific functional limitations, and that plaintiff's argument
4 relies upon his diagnoses and assessment of GAF score. (ECF No. 17 at 23.) However, Dr. Rosekrans
5 stated, "She has the lethargy typical of severe depression," "She is depressed and anxious," and "Major
6 impairment in several areas of functioning." (Tr. 265.) These statements are suggestive of possible
7 functional limitations and could reasonably be construed as supporting the findings of Dr. Dalley.
8 However, because the ALJ did not adequately address Dr. Rosekrans' report, it is not clear whether he
9 intended to assign weight to the opinion or to reject the opinion. As a result, the ALJ erred.

10 **c. Dr. Arnold**

11 Plaintiff argues the ALJ failed to set forth specific, legitimate reasons supported by substantial
12 evidence for rejecting Dr. Arnold's opinion. (ECF no. 15 at 16.) Dr. Arnold examined plaintiff and
13 completed a DSHS Psychological/Psychiatric Evaluation form. (Tr. 461-66.) He diagnosed major
14 depression, recurrent, moderate; and generalized anxiety. (Tr. 463.) Dr. Arnold assessed three marked
15 and two moderate cognitive limitations and one marked and three moderate social limitations. (Tr. 464.)
16 The results of the Rey 15-items test were not within normal limits, suggesting plaintiff was not trying as
17 hard as she could have. (Tr. 466.) Her PAI profile was invalid, which Dr. Arnold opined was suggestive
18 of a "plea for help." (Tr. 466.)

19 The ALJ gave little weight to Dr. Arnold's opinion. (Tr. 23.) The ALJ's first reason for rejecting
20 Dr. Arnold's opinion is Dr. Arnold did not have the opportunity to review records relevant to plaintiff's
21 status and level of functioning. (Tr. 23.) Under the "Summary of records reviewed" section of the DSHS
22 form, Dr. Arnold wrote the names of the tests he administered but did not list any other medical or
23 psychological records. (Tr. 461.) The court finds no authority suggesting an examining physician's
24 opinion is entitled to little or no weight because records are not available for the examiner's review, and
25 none is cited by defendant. Furthermore, Dr. Arnold's conclusions are similar to Dr. Dalley's conclusions,
26 even though there was no review of other psychological records. Dr. Arnold interpreted the invalid PAI
27 results similar to Dr. Dalley and arrived at similar diagnoses. (Tr. 461.) As such, it is not clear how Dr.
28 Arnold's findings are less reliable or less accurate because he did not review other psychological

1 evidence. This is not a legitimate reason for rejecting Dr. Arnold's opinion.

2 The second reason mentioned by the ALJ is that Dr. Arnold's opinion was based largely on
3 plaintiff's self-report while trying to qualify for public assistance benefits. (Tr. 23.) A physician's opinion
4 may be rejected if it is based on a claimant's subjective complaints which were properly discounted.
5 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Fair*, 885 F.2d at 604. In this case, the ALJ
6 made a credibility determination supported by clear and convincing reasons and substantial evidence, and
7 plaintiff has not challenged that determination. However, Dr. Arnold noted he conducted objective testing
8 including the PAI, the BDI-II, the Rey 15-item test and a mental status exam. (Tr. 461.) While Dr. Arnold
9 did not discuss the results of each test in detail, his comments make clear he relied on more than just
10 plaintiff's self-report in making his assessment.

11 The third reason mentioned by the ALJ in rejecting Dr. Arnold's conclusions is that psychological
12 test results indicated plaintiff was prone to exaggerating her symptoms. (Tr. 23.) However, similar to Dr.
13 Dalley, Dr. Arnold interpreted the exaggeration of symptoms as a "plea for help" rather than evidence
14 of malingering. (Tr. 466.) There is no basis in the record for the ALJ to conclude this evidence constitutes
15 malingering or makes Dr. Arnold's report less reliable.

16 Lastly, the ALJ pointed out Dr. Arnold did not prepare a detailed evaluation but instead completed
17 the state's check-box psychological form. (Tr. 23.) An opinion on a check-box form or form reports
18 which do not contain significant explanation of the basis for the conclusions may accorded little or no
19 weight. *See Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996); *Johnson v. Chater*, 87 F.3d 1015, 1018
20 (9th Cir. 1996). Dr. Arnold did not attach a narrative explanation or office visit notes to the DSHS
21 evaluation form, but he did explain the basis for each limitation assessed. (Tr. 464.) His explanations
22 mentioned results of the mental status exam and personal observations. (Tr. 464.)

23 Because this matter is remanded for reconsideration of other medical opinions, the court need not
24 determine whether the ALJ erred in assessing Dr. Arnold's opinion. On remand, the ALJ should
25 reconsider all of the psychological opinion evidence and obtain an opinion from a psychological expert
26 if necessary.

27 **2. Medical Opinions**

28 **a. Dr. Bare and PA-C Ward**

1 Plaintiff argues the ALJ failed to properly consider and reject the opinion of Dr. Bare and PA-C
 2 Ward. (ECF No. 15 at 19-20.) In February 2009, PA-C Ward examined plaintiff and completed a DSHS
 3 Physical Evaluation form.³ (Tr. 416-19, 435-38.) Ms. Ward assessed benign hypertension, depression,
 4 dysmetabolic syndrome, reflux esophagitis, restless leg syndrome and sleep apnea. (Tr. 419, 437.) She
 5 assessed a marked interference with work-related activities due to depression and a moderate interference
 6 with work-related activities due to obesity and sleep apnea. (Tr. 437.) PA-C Ward opined plaintiff's work
 7 level is "severely limited," which is defined as unable to lift at least two pounds or unable to stand and/or
 8 walk. (Tr. 437.)

9 The ALJ gave very little weight to the opinion signed by PA-C Ward and Dr. Bare because,
 10 "There are no objective clinical findings documented in the record that support the extensive limitations
 11 set forth by Ms. Ward and Dr. Bare." (Tr. 22-23.) An ALJ may discredit treating physicians' opinions that
 12 are unsupported by the record as a whole or by objective medical findings. *Batson v. Comm'r, Soc. Sec.*
 13 *Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004) Other factors relevant to evaluating any medical opinion
 14 include the amount of relevant evidence that supports the opinion, the quality of the explanation provided
 15 in the opinion, and the consistency of the medical opinion with the record as a whole. *Lingenfelter v.*
 16 *Astrue*, 504 F.3d 1028, 1042 (9th Cir. 2007); *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007) The ALJ
 17 noted the "severely limited" assessment is not consistent with plaintiff's treatment records or x-ray
 18 images that note generally mild findings. (Tr. 22-23.) An x-ray of plaintiff's ankle revealed no acute
 19 findings, only evidence of the old healed fracture (Tr. 286, 498), and views of the lumbar spine, both

21 ³Dr. Bare signed the DSHS Physical Evaluation form under the heading, "Releasing
 22 Authority/Supervising Professional's Signature." (Tr. 438.) There is no evidence that Dr. Bare personally
 23 examined plaintiff or that he intended to adopt PA-C Ward's opinion as his own. (Tr. 416-19, 435-38.)
 24 However, because the ALJ treated the opinion as the opinion of a physician rather than the opinion of a
 25 physician's assistant, or "other source," the court also considers the opinion as Dr. Bare's opinion. Thus,
 26 the ALJ must provide specific, legitimate reasons supported by substantial evidence in rejecting the
 27 opinion. It is also noted that plaintiff asserts the opinion of Dr. Bare and PA-C Ward is that of a treating
 28 physician, but the DSHS form was completed by Ms. Ward after her first visit with plaintiff. (Tr. 416.)

knees, left elbow, cervical spine, right shoulder, and chest were all essentially unremarkable. (Tr. 289, 346, 347, 384, 385, 483.) The ALJ also pointed out exam findings show minimal decreases in range of motion, full grip strength, and intact sensation. (Tr. 23, 354, 379, 388, 393.) Plaintiff's argument is focused on demonstrating there is evidence supporting various diagnoses in the record, many of which were found by the ALJ to be severe impairments. (ECF No. 15 at 19, Tr. 16-17.) However, the ALJ pointed out inconsistencies in the record and the severity of the limitations assessed by PA-C Ward and Dr. Bare. The ALJ's reasoning is supported by substantial evidence in the record and the ALJ did not err by rejecting the opinion of Dr. Bare and PA-C Ward.

b. Other Medical Opinions

Plaintiff's assignment of error is unclear, but plaintiff seems to argue the ALJ improperly relied upon the opinions of non-examining physicians over the opinions of treating sources. (ECF No. 15 at 17-18.) The opinion of a non-examining physician cannot by itself constitute substantial evidence that justifies the rejection of the opinion of either an examining physician or a treating physician. *Lester*, 81 F.3d at 831, citing *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990). However, the opinion of a non-examining physician may be accepted as substantial evidence if it is supported by other evidence in the record and is consistent with it. *Andrews*, 53 F.3d at 1043; *Lester*, 81 F.3d at 830-31. Cases have upheld the rejection of an examining or treating physician based on part on the testimony of a non-examining medical advisor; but those opinions have also included reasons to reject the opinions of examining and treating physicians that were independent of the non-examining doctor's opinion. *Lester*, 81 F.3d at 831, citing *Magallanes v. Bowen*, 881 F.2d 747, 751-55 (9th Cir. 1989) (reliance on laboratory test results, contrary reports from examining physicians and testimony from claimant that conflicted with treating physician's opinion); *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995) (rejection of examining psychologist's functional assessment which conflicted with his own written report and test results). Thus, case law requires not only an opinion from the consulting physician but also substantial evidence (more than a mere scintilla but less than a preponderance), independent of that opinion which supports the rejection of contrary conclusions by examining or treating physicians. *Andrews*, 53 F.3d at 1039.

The ALJ assigned limited weight to Dr. Opara's findings. (Tr. 22.) In August 2006, Dr. Opara examined plaintiff and diagnosed degenerative arthritis of the right ankle, GERD, inflammatory arthritis,

1 anxiety with depressed mood, obesity and restless leg syndrome by history. (Tr. 294.) Dr. Opara noted
2 plaintiff is able to sit comfortably but it would be reasonable to limit lifting or carrying to 10 pounds
3 frequently and 15 pounds occasionally. (Tr. 294.) He opined her musculoskeletal problems and
4 depression are likely to be associated with moderate limitations in terms of being able to work in most
5 job situations. (Tr. 295.) Dr. Opara also indicated plaintiff's depression and anxiety limit her ability to
6 work in proximity to others or accept instructions and criticisms from supervisors. (Tr. 294-95.)

7 The ALJ concluded Dr. Opara's assessment of limitations is not consistent with his physical
8 examination. (Tr. 22.) A medical opinion may be rejected by the ALJ if it contains inconsistencies. *Bray*
9 *v. Comm'r Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009). The ALJ observed Dr. Opara's
10 assessment of limitations is inconsistent with his exam findings of normal range of motion and other
11 benign findings in the record. (Tr. 22, 294.) The ALJ also pointed out Dr. Opara appeared to rely heavily
12 on plaintiff's self-report of functioning in making his assessment. (Tr. 22, 291-92.) A physician's opinion
13 may be rejected if it is based on a claimant's subjective complaints which were properly discounted.
14 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001); *Fair*, 885 F.2d at 604. The ALJ's reasons for
15 rejecting Dr. Opara's opinion are supported by substantial evidence and are not challenged by plaintiff.
16 Thus, the ALJ did not err in rejecting Dr. Opara's opinion.

17 Plaintiff also suggests the ALJ by not adopting the opinion of Diane Beernink, a treating ARNP.
18 Ms. Beernink. (ECF No. 15 at 18.) Ms. Beernink began seeing plaintiff in October 2006 and completed
19 a DSHS Physical Evaluation form in October 2007. (Tr. 342-45, 391.) Ms. Beernink diagnosed
20 insomnia/obstructive sleep apnea and neck/shoulder pain with occasional right arm numbness. (Tr. 344.)
21 She opined plaintiff's ability to complete work-related activities was moderately limited by sleep apnea
22 and assessed a sedentary work level. (Tr. 344.) The opinion of an "other source" such as an ARNP is
23 given less weight than the opinion of an acceptable medical source such as a physician. 20 C.F.R. §§
24 404.1527, 416.927; *Gomez v. Chater*, 74 F.3d 967, 970-71 (9th Cir. 1996). However, the ALJ is required
25 to "consider observations by non-medical sources as to how an impairment affects a claimant's ability
26 to work." *Sprague v. Bowen*, 812 F.2d 1226, 1232 (9th Cir. 1987). Pursuant to *Dodrill v. Shalala*, 12 F.3d
27 915 (9th Cir. 1993), an ALJ is obligated to give reasons germane to "other source" testimony before
28 discounting it. The ALJ did not specifically assign weight to the opinion of Ms. Beernink, although her

1 records are noted throughout the ALJ's decision. (Tr. 17, 21, 23.) Even if the ALJ erred in failing to
2 assign weight to the opinion of Ms. Beernink, the error is harmless. Ms. Beernink assessed plaintiff's
3 work level as sedentary, and the ALJ noted the vocational expert testified there would be a broad range
4 of light and sedentary unskilled work a hypothetical worker with plaintiff's limitations could perform.
5 (Tr. 23.) As a result, even if Ms. Beernink's opinion was credited, the outcome would be the same.

6 The court concludes there is no error with respect to the ALJ's consideration of the medical
7 evidence. However, because the ALJ erred in considering the psychological opinion evidence, the matter
8 must be remanded.

9 CONCLUSION

10 The ALJ's decision is not supported by substantial evidence and free of legal error. On
11 remand, the ALJ should reconsider the psychological opinion evidence, provide legally sufficient
12 reasons for the weight assigned to all relevant opinions, and obtain the opinion of a psychological
13 expert if appropriate.

14 Accordingly,

15 IT IS ORDERED:

16 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is **GRANTED**. The matter is
17 remanded to the Commissioner for additional proceedings pursuant to sentence four 42 U.S.C.
18 405(g).

19 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 16**) is **DENIED**.

20 3. An application for attorney fees may be filed by separate motion.

21 The District Court Executive is directed to file this Order and provide a copy to counsel for
22 plaintiff and defendant. Judgment shall be entered for plaintiff and the file shall be **CLOSED**.

23 DATED November 28, 2012

24
25 S/ JAMES P. HUTTON
26 UNITED STATES MAGISTRATE JUDGE
27
28